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In The

Supreme Court of the United States

TERM, 1958

No. 972

PERRY HARTMAN CANADAY and C. B. RICHARDSON,
Citizens of the U. S. A., and Residents of
the State of Tennessee,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee

H. G. B. KING,
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Chattanooga, Tennessee,
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301 Stahlman Building
Nashville, Tennessee
Of Counsel

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In The

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No.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee

On February 6, 1958 the highest Court of Tennessee, the State Supreme Court, affirmed a judgment against Perry Hartman Canady and C. B. Richardson, upon a presentment charging a conspiracy to commit an assault and battery and were fined One Thousand Dollars ($1,000.00) each and sentenced to serve a term in the County Workhouse for a period of eleven months and twenty-nine days. (R. 50, Appendix E).

The State of Tennessee, in so sentencing the petitioners, denied them due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that:

1. They did not receive a trial by a fair and impartial jury.

2. They did not receive a fair trial because the press so abused the defendants as to make it impossible for them to receive a fair trial in the locale in which they were tried.

OPINIONS BELOW

The only Court filing an opinion below was the Supreme Court of Tennessee (R. 44, Appendix D).

JURISDICTION

The jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution.

Due process of law contemplates not only a right to trial by a jury but a fair and impartial jury.

After a panel of Seven Hundred (700) prospective jurors had been exhausted the defendant, Perry Hartman Canady, moved the trial court to discharge the jury and to declare a mistrial and also moved the trial court for a change of venue on the ground that so many jurors had been disqualified upon admission of bias and prejudice against the defendants because of the continued and repeated presence of news stories in the newspapers circulated in the vicinity where they were being tried, labeling the defendant as a "business agent of the Teamsters Union", "a police character", "an ex-convict", a "participant in and under indictment for a 'brutal beating' of a non-union truck driver". The repeated and incessant haranguing of the defendants by the newspaper precluded the possibility of a fair trial in Davidson County, Tennessee. The jury was not and could not be fair and impartial under the circumstances. (R. 28, Appendix A-B.)

The trial court overruled the motions (R. 28).

The action of the trial court in not granting a mistrial for a change of venue was assigned as error in the Supreme Court of Tennessee. (R. 42, Appendix C).

QUESTION PRESENTED

The record in this cause presents one question:

Is there a violation of "due process" within the meaning of Section 1 of the Fourteenth Amendment to the United States Constitution when the trial is held at a time and in a locale where feelings against the defendants were high because of the influence of continued and repeated newspaper publications adverse to them?

STATEMENT

The defendants in this case were tried before a jury upon a presentment that charged they conspired with an unknown person to commit an assault and battery upon a non-union truck driver. The defendant Perry Hartman Canaday is a Business Agent for the Local 327 Teamsters Union and C. B. Richardson is a member of the Teamsters Union Local 327. The petitioners were not charged with actually committing the assault but were charged with being present and aiding the "unknown white man". (R. 4-12).

The deleterious influence of the newspapers in the matter was made evident by the following facts:

(1) On the 31st day of January, 1957 the State's Attorney appeared in open court and asked the Trial

Judge for a special panel of jurors and the court subpoenaed One Hundred (100) prospective jurors for the trial date which was February 4, 1957 (R. 11).

(2) On February 5, 1957 the court ordered another One Hundred Fifty (150) prospective jurors subpoenaed into court because the panel heretofore subpoenaed had been exhausted. (R. 14).

(3) On February 6, 1957 the court ordered another One Hundred (100) prospective jurors subpoenaed into court because the panel heretofore subpoenaed had been exhausted. (R. 15).

(4) On February 7, 1957 the court ordered another One Hundred (100) prospective jurors subpoenaed into court because the third panel had been exhausted. (R. 18).

(5) On February 8, 1957 the court ordered another One Hundred (100) prospective jurors subpoenaed into court because the other panels had been exhausted. (R. 21).

(6) On February 9, 1957 the court ordered another One Hundred (100) prospective jurors subpoenaed into court because the other panels had been exhausted. (R. 22).

(7) On February 11, 1957 the court ordered another Fifty (50) prospective jurors subpoenaed into court because the other panels had been exhausted. (R. 25).

On February 21, 1957 the defendant, Perry Hartman Canaday moved the trial court for a change of venue on the ground that "from undue excitement against him and great prejudice against him and repeated publication of stories and articles in the newspapers circulated in Davidson County, Tennessee, where he has been condemned as being a "Business Agent of the Teamsters Union," as a "police character" and as a participant in and under indictment for a "brutal beating" of a non-union truck driver, a fair trial in his cause could not properly be had". (R. 27, Appendix A).

On the same date the defendant moved the court to discharge the jury impaneled because of the bias and prejudice against him resulting from the news stories. (R. 28, Appendix B).

Both of the motions were overruled and the case proceeded to trial.

The defendants, Perry Hartman Canaday and C. B. Richardson, were found guilty of conspiracy to commit assault and battery and were fined the sum of One Thousand Dollars ($1,000.00) and sentenced to eleven months and twenty-nine days in the county workhouse, the maximum for this offense.

The petitioners moved for a new trial: "Because the court erred in overruling and disallowing that motion for a mistrial made by the defendants, it conclusively appearing that these defendants could not be accorded a fair trial, due to the great prejudice existing in the community against them, thereby depriving these de-

fendants of the equal protection of the laws as guaranteed by the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States." (R. 37).

"Because the Court erred in overruling and disallowing the application of the defendant, Perry Hartmant Canaday, for a change of venue, it appearing that the defendant could probably not obtain a fair trial due to the manifest prejudice against him in the community, whereby the defendants were denied the equal protection of the laws guaranteed by the Constitution of the State of Tennessee and by the Fourteenth Amendment to the Constitution of the United States." (R. 37).

The same questions were raised in the State Supreme Court by assignment of error and was overruled (R. 42. Appendix C.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

There was a tremendous out of court pressure brought to bear in this case by newspapers circulating stories, calculated to reflect upon the petitioners, the effect of which was clearly demonstrated by the fact that it was necessary to summons over seven hundred (700) jurors before a panel could be obtained because of admission and disclosures of bias and prejudice against the defendants.

When it became apparent that the defendants could not and would not receive a fair trial it was the duty

of the trial court to remove the case to another locality or to continue the case until feelings had subsided. As this court pointed out in the case of *Shepherd* v. *Florida*, 341 U.S. 50, 95 L. Ed. 740, 71 Sup. Ct. 549:

> "... if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These conflictions, accompanied by such events, do not meet any civilized conception of due process of law."

In this case, where panel after panel of jurors were exhausted, because of open admission of bias and prejudice against the defendants because of newspaper stories, it becomes apparent these defendants were prejudged as guilty and the verdict was dictated by the press and public opinion.

Under the circumstances of this case, and more especially after the timely motion of one of the defendants for a change of venue or a continuance, the trial court should have acted in order to insure that these defendants received a fair and impartial trial and not one dominated by bias and prejudice against the defendants.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that petitioners were convicted in violation of the due process clause of the Fourteenth Amendment, and they are at least entitled to a new trial. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

H. G. B. KING,
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Chattanooga, Tennessee
Attorney for Petitioners.

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Nashville, Tennessee
Of Counsel.

7115—APPLICATION FOR CHANGE OF VENUE

APPENDIX A

State of Tennessee	Fel. Conspiracy & Conspiracy Code 11064 and 11067
vs.	
Perry Hartman Canaday, et al.	

Comes the defendant, Perry Hartman Canady, by his Attorneys and in his own proper person and respectfuly applies to the Court for a change of venue herein, upon the ground that from undue excitement against him and great prejudice against him arising from long continued and repeated publication of stories and articles in the newspaper circulated in Davidson County, Tennessee, wherein he has been advertised as a business agent of the Teamster's Union, as a "police character" and as a participant in and under indictment for a "brutal beating" of a non-union truck driver, a fair trial of his cause could not probably be had. In this connection said defendant calls to the attention of the Court the many prospective jurors subjected to challenge for cause upon their open admission of bias and prejudice based upon said newspaper articles and discussion thereof.

s Z. T. Osborn, Jr.
Attorney for Defendant.

Filed: February 12, 1957.
Alma Ridley, D. C.

7145—MOTION TO DISMISS JURY

APPENDIX B

State of Tennessee	Fel. Conspiracy & Conspiracy Code 11064 and 11067
vs.	
Perry Hartman Canady	

MOTION TO DISMISS JURY

Comes the defendant, Perry Hartman Canaday, and respectfully moves the Court to dismiss and discharge the jurors impaneled for the trial of the above cause, and for the entry of an order declaring a mistrial herein, on the ground that, as defendants' counsel have been allowed greater latitude in their examination of jurors on vior dire, a vastly increased percentage of prospective jurors are subjected to challenge for cause, said prospective jurors being disqualified upon admission and disclosure of bias and prejudice against this defendant, due to the continued and repeated publication of news stories in the newspapers circulated in Davidson County, Tennessee, wherein the defendant has been publicized as "a business agent for the Teamsters Union", "a police character", "an ex-convict", under indictment for felonious conspiracy arising out of the "brutal beating" of a non-union truck driver.

s/ Z. T. Osborn, Jr.

Filed Feb. 12, 1957.
Alma Ridley, D. C.

APPENDIX C

From Assignments of Error, filed 12-3-57 in Tenn. Supreme Court.

III.

The Trial Court erred in overruling and disallowing the motion to dismiss the jury and for an order declaring a mistrial, and in overruling and disallowing the application for change of venue made by the appellant, Canaday, which motions are in words and figures as follows, to-wit:

> "Comes the defendant, Perry Hartman Canaday, and respectfully moves the Court to dismiss and discharge the jurors impaneled for the trial of the above cause, and for the entry of an order declaring a mistrial herein, on the ground that, as defendants' counsel have been allowed greater latitude in their examination of jurors on vior dire, a vastly increased percentage of prospective jurors are subjected to challenge for cause, said prospective jurors being disqualified upon admission and disclosure of bias and prejudice against this defendant, due to the continued and repeated publication of news stories in the newspapers circulated in Davidson County, Tennessee, wherein the defendant has been publicized as 'a business agent for the Teamsters Union,' 'a police character,' 'an ex-convict,' 'under indictment for felonious conspiracy' arising out of the 'brutal beating' of a non-union truck driver."

"Comes the defendant, Perry Hartman Canaday, by his attorneys and in his own proper person and respectfully applies to the Court for a change of venue herein, upon the ground that from undue excitement against him and great prejudice against him arising from long continued and repeated publication of stories and articles in the newspapers circulated in Davidson County, Tennessee, wherein he has been advertised as a business agent of the Teamster's Union, as a 'police character' and as a participant in and under indictment for a 'brutal beating' of a non-union truck driver, a fair trial of his cause could not probably be had. In this connection said defendant calls to the attention of the Court the many prospective jurors subjected to challenge for cause upon their open admission of bias and prejudice based upon said newspaper articles and discussion thereof."

Article 1, Section 6 of the Constitution of Tennessee provides as follows:

"6. *Number of Jurors.*

"The right of trial by jury is the right guaranteed to every litigant in jury cases to have the facts tried and determined by 12 jurors. *Willard* v. *State* (1939), 174 Tenn. 642, 130 S. W. (2d) 99."

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "§ 1. *Citizenship—Due process of law—Equal Protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The right to trial by jury is the right to a trial by a fair and impartial jury. Due process of law contemplates a trial upon the merits and not a trial upon matters published in the daily paper with reference to a case.

Disallowance of the motion for new trial and for change of venue deprived the appellants of the trial by jury contemplated by the Constitution of Tennessee, and that without due process of law as guaranteed by the Constitution of the United States, as amended.

APPENDIX D

Perry Hartman Canaday, et al.	Davidson Criminal
v.	Hon. Chester K.
The State of Tennessee	Hart, Judge

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEE
H. G. B. KING, Chattanooga, Tenn.	THOMAS E. FOX, *Asst. Attorney Gen.* Nashville, Tenn.
Z. T. OSBORN, JR., Nashville, Tenn.	

OPINION

The defendants below, Perry Hartman Canaday and C. B. Richardson, were convicted for a conspiracy to commit an assault and battery and fined $1,000.00 each, and sentenced to serve in the county workhouse for a period of eleven months and twenty-nine days. The third defendant, James Gilley, was acquitted by the jury.

The record discloses that the defendants did not take the stand and did not testify in their own behalf.

The principal assignment of error is that the evidence preponderates against the verdict of the jury and in favor of the innocence of these two men.

It appears that the prosecutor, one James T. Bruce, was a very small man in statue and was beaten up in the restaurant where the alleged assault and battery took place.

It seems that the person, who actually committed the assault, was never found and, of course, not brought to trial. The victim, Bruce, was carried to Vanderbilt Hospital on the date of his injury, after having first been carried to the General Hospital. Doctor Meacham, at Vanderbilt Hospital found that the victim had a skull and jaw fracture and that he was suffering concussions of the brain which caused him to be semi-conscious. He was treated by Doctor Meacham until January 3, 1956.

It appears that on the day of the assault, Bruce went with five of his companions to Martin's Restaurant on Murfreesboro Road, to eat, and this was on November 21, 1955, between five and six p.m. He and his companions were all operators of tractors leased to the B&S Motor Lines, Inc. Some of them owned the truck they operated and considered themselves to be independent contractors, paid on a mileage basis. Others did not own the truck they operated but none of them thought themselves to be employees of the B&S Motor Lines.

It seems that until shortly before November 25, 1955, and from about February 2, 1955, the Teamster's Union Local 327, had maintained a picket line near the B&S Motor Lines, which the victim and some of his companions on November 21st, had crossed with their trucks during the time the picket was in progress.

It seems that Bruce had received a subpoena to testify as one of the principal witnesses before the National Labor Relations Board.

The defendants were seen on the picket line several times during the period it was maintained by the victim. Bruce knew the defendant Richardson, who had worked for him as a relief driver. Some of his companions knew the defendants by name and all of them knew the defendants by sight, having seen them in the picket line.

Robinson, a State's witness, testified that when he, Bruce and their four companions arrived at Martin's Restaurant to eat he, Robinson, went outside the restaurant to the restroom, noticed the defendant Richardson getting in his car which was parked behind the restaurant in the alley.

After dinner together at the same table, these drivers left the restaurant—each of them paying his own check as they passed the cash register near the front entrance of the restaurant. All of them noticed a man sitting on a stool at the counter near the cash register, who was wearing a green work shirt with the words on the back of the shirt "North Texas Steel Company."

These drivers did not know when this man entered the restaurant, but one of the drivers saw him there while they were eating and noticed that he seemed to be watching the witness and also noticed another man with him whom the witness identified as James Gilley. Mr. Martin, the owner of the restaurant, testified that

the man with the green shirt and a companion, whose name he did not know, but who was not James Gilley, entered the restaurant while the truck drivers were eating. One of these men sat on a stool at the counter near the cash register, and the other by his side. It seems that the defendants, Canaday and Richardson did not enter the restaurant while Bruce and his companions were eating.

Later on some of the truck drivers were waiting at the car in which they were riding and others were on their way to the car parked beside the restaurant when they heard a "thud like" sound. They then saw Bruce lying with his face down and in an unconscious condition near the entrance to the restaurant. Just behind him stood the man with the green work shirt, who had been at the counter and another man identified by the truck drivers to be James Gilley.

Witness, Wayne Puckett, testified that James Gilley was not standing there with the man in the green work shirt and he also testified that he did not see the defendants, Canaday and Richardson appear on the scene a few minutes later which was also contrary to the testimony of his companions.

When the man with the green shirt was asked why he hit Bruce, he replied, "Because he is a God Damn Scab!"

The witness, Robinson, further testified that after Bruce was struck both defendants, Canaday and Richardson, were seen talking to the man with the green work shirt and the other man standing by him near the

front of the restaurant where the victim was struck. The four of them soon disappeared around the corner of the restaurant and then immediately came back around the restaurant in a two-tone Ford car heading toward Nashville. Canaday was driving and the man in the green shirt was on the front seat with him. Defendant Richardson and James Gilley were on the back seat.

This was corroborated and verified by other truck drivers except, Wayne Puckett, who also saw them drive to the restaurant and in back of the restaurant from the direction of Murfreesboro, immediately prior to the time they were seen talking to the man wearing the green shirt and this man standing by him.

We think, under the above statement of facts, that there is sufficient evidence to support the verdict of the jury. It is true that no formal agreement to commit the assault upon Bruce is shown, but the circumstances revealed in the record show that there was a common understanding and design on the part of the defendants and the man with the green shirt, who actually made the assault on Bruce.

In *Solomon* v. *State*, 168 Tenn. 180, 182 it was said:

> "No formal agreement between the parties to do the act charged is necessary. It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged, although such agreement is not manifested by any formal words, or by a writ-

ten instrument. A mutual implied understanding is sufficient, so far as the combination or confederacy is concerned, to constitute the offense. If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. Previous acquaintance is unnecessary, and it is not essential that each conspirator shall take part in every act, or that he shall know the exact part to be performed by the other conspirators in execution of the conspiracy. Conspiracy implies "concert of design and not participation in every detail of execution."

Complaint is also made about the instructions of the trial judge to the jury. We think the trial judge gave an adequate and sufficient charge as to the term reasonable doubt.

We have considered all of the assignments of error, find them without merit and the judgment of the lower court is affirmed.

PREWITT, J.

Judgment, Supreme Court of Tennessee, filed Feb. 6, 1958.

APPENDIX E

Perry Hartman Canaday
v.
State

Davidson Criminal.
Affirmed.

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Perry Hartman Canaday, the plaintiff in error, for the use of the County of Davidson the sum of $1,000.00, the fine assessed against Perry Hartman Canaday in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Davidson County, subject to the lawful rules and regulations thereof, for a term of 11 months, 29 days and that after the expiration of the aforesaid term of imprisonment, he remain in the custody of the Sheriff

of Davidson County until said fine and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Davidson County for the execution of this judgment. 2 6 58

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STATE OF TENNESSEE,
Respondent.

REPLY FOR RESPONDENT IN OPPOSITION.

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Attorney General,
State of Tennessee.

THOMAS E. FOX,
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State of Tennessee.

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STATE OF TENNESSEE,
Respondent.

REPLY FOR RESPONDENT IN OPPOSITION.

MAY IT PLEASE THE COURT:

The petitioners pray that a writ of certiorari issue to review an opinion and judgment of the Supreme Court of Tennessee dated February 6, 1958.

OPINION BELOW.

The order overruling the motion for a new trial and judgment of the trial court (Tr. 49-50) is unreported. The opinion of the Supreme Court of Tennessee affirming this

conviction is reported unofficially in 319 S. W. 2d 428, and will be reported in (. . . . .) Tenn. (. . . . .) (Appendix D to Petition).

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the Fourteenth Amendment to the Federal Constitution.

QUESTION PRESENTED.

Whether or not the Honorable Trial Judge's refusal to grant the petitioners' motion for a change of venue and their motion for a mistrial constitutes such a denial of due process as to afford this Honorable Court jurisdiction to review their conviction, in the absence of any evidence to support the allegations contained in said motion to the effect that the jurors were biased and prejudiced because of unfavorable newspaper reports and headlines against the defendants and the local unit (Teamster's Local No. 327) to which they belonged.

STATEMENT.

The jury in this cause was selected from a total of 700 prospective veniremen (Tech. R. 21-33). This jury found the petitioners guilty of conspiracy to commit an assault and battery and imposed a fine of $1,000.00 on each of them (Tech. R. 42). The Trial Judge overruled the motion for a new trial in petitioners' behalf and imposed an additional sentence of eleven months and twenty-nine days in the workhouse of Davidson County, Tennessee, upon each petitioner (Tech. R. 49-50).

None of the testimony in this Record has been certified to this Honorable Court. Therefore, it is impossible for counsel representing the Respondent to make a statement of

the facts in this case without get ing outside the part of the Record certified.

To support the motion for a change of venue and the motion for a mistrial, counsel for the petitioners in said motion directed the attention of the Honorable Trial Judge to the number of prospective jurors subject to challenge for cause upon their open admission of bias and prejudice resulting from newspaper articles. The Court inquired if counsel for the petitioners desired to produce testimony in support of their motion and the said counsel declined to offer any testimony to that effect. The Honorable Trial Judge then overruled counsel's motion (Tech. R. 36-37).

The portion of the certified record does not indicate the number of prospective jurors challenged for the cause stated above or for other causes, nor can it be determined from the certified portion of the record whether or not there was any basis for said motion. Since no other portion of the record was requested to be certified, it must be assumed that there was nothing contained therein to support petitioners' motions.

ARGUMENT.

Counsel for the petitioners cite and rely upon the case of **Shepherd v. Florida**, 341 U. S. 50, 95 L. ed., 71 Sup. Ct. In that case, **Shepherd v. Florida**, supra, the facts showed that witnesses and persons called as jurors said that they had read or heard of the Sheriff's statements in the county where the case was tried to the effect that the defendants had confessed to the commission of the offense as well as other inflammatory information, and no effort was made to introduce the confession at the time of the trial. Such was not true in the instant case, or at least it is not disclosed by the record. There is nothing in the certified portion of the record to indicate that any witnesses or prospective jurors on voir dire testified in support of said motions, nor was any effort made to submit proof of the facts alleged or stated in their motions even after the Honorable Trial Judge asked if counsel desired to submit proof. Certainly it cannot be said that the allegations made in the motions were evidence within themselves.

Evers v. Hollman, 196 Tenn. 364, 268 S. W. 2d 97, 99:

> "This is because a motion is nothing more than a pleading, and a pleading, nothing else appearing, is not evidence."

Overton v. State, 165 Tenn. 575, 579, 56 S. W. 2d 740, 742:

> "The motion for a new trial represents that certain requests were offered, but as we have often pointed out, the motion for a new trial is nothing but a pleading and cannot be looked to as establishing facts that it alleges."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

.....

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

.....

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I have mailed a copy of this Reply for Respondent in Opposition to the Hon. H. G. B. King, 723 Chattanooga Bank Building, Chattanooga, Tennessee, and to the Hon. C. Allen High, 301 Stahlman Building, Nashville, Tennessee, on the ... day of May, 1958.

.....

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.